SUPREME COURT, U. S.

FILED
JUL 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1261

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

GOLDMAN & COOPERMAN
Attorneys for Appellant
122 East 42nd Street
New York, New York 10017

ROBERT E. GOLDMAN
Of Counsel

TABLE OF CONTENTS

	PAGE
PETITION FOR REHEARING	1–5
CERTIFICATE	5

TABLE OF AUTHORITIES

Cases:

Gardner v. Broderick, No. 635, October Term, 1967, decided June 10, 1968	2, 3
Garrity v. New Jersey, 385 U. S. 493	2, 4
Spevak v. Klein, 385 U. S. 511	2
Stevens v. Marks, 383 U. S. 234	2
Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation of the City of New York, No. 823, October Term, 1967, decided June 10, 1968	2

IN THE

Supreme Court of the United States

October Term, 1968

No. 1261

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

Now comes the petitioner, Lewis P. Goldman, by his counsel, and respectfully prays for a rehearing on his Jurisdictional Statement and petition for a writ of certiorari previously filed with this Court (No. 1261). This petition is made because it is respectfully suggested that petitioner's application did not receive due consideration.

Because of the complex issues involved which were recently the subject of extensive deliberation by this Court, petitioner filed a Jurisdictional Statement and in the al-

ternative specifically requested certiorari consideration based on the nature of the questions presented. On June 17, 1968 this Court denied jurisdiction upon the ground that no substantial federal question was presented. However, the opinion remains silent as to the application insofar as the application for a writ of certiorari. In the event that this Court reiterates its opinion with regard to jurisdiction, then it is respectfully requested that specific attention be directed to the question of certiorari, especially in view of Mr. Justice Black's and Mr. Justic Douglas' opinion that the judgment of conviction should be reversed.

It is with all humility that petitioner suggests that this Court should accept this matter for review, particularly after this Court's decisions in *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511; *Stevens* v. *Marks,* 383 U. S. 234; *Gardner* v. *Broderick,* No. 635, October Term, 1967, decided June 10, 1968; and *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* No. 823, October Term, 1967, decided June 10, 1968, with which the instant finding appears to be in conflict.

The sum total of the above decisions renders each and every step of the conduct of the Authorities in the instant case improper and invalid. *Gardner, supra* and *Uniformed Sanitation Men's Association, Inc., supra,* condemn the Hobson's choice of waiving immunity and testifying or forfeiting livelihood as it was presented to petitioner in the instant case. *Garrity* prohibits the attempted use in a subsequent criminal proceeding of any testimony obtained pursuant to such improper exercise of coercion.

The importance of the issues herein cannot be gainsaid and has been oft recognized by this Court as such. Initially, this appeal or application for a writ of certiorari is directed to the open question in *Gardner, supra,* to wit:

> "We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in Garrity v. New Jersey, supra, would have been to nullify the effect of the waiver."

This Court in the same opinion (*Gardner*) subsequently stated:

> "It is clear that petitioner's testimony was demanded before the grand jury in part *so that it might be used to prosecute him* and not solely for the purpose of securing an accounting of his performance of his public trust." (Emphasis supplied.)

To deny petitioner's application herein is in effect to decide the question about which it was made clear there was to be no speculation. The phrasing of the above question indicates that if this case were fully considered, the conclusion would indicate an intolerable violation of the privilege against self-incrimination.

This seems manifest since the waiver herein was obtained under the proscribed circumstances as indicated above, *i.e.,* for use in future prosecution, and not merely to obtain an accounting of the public trust.

Thus, the Court's action herein, or should it deny certiorari, is to permit a result totally inconsistent with its earlier decisions. In effect it acknowledges the validity of the waiver of immunity obtained under the instant circum-

stances in a case where a future prosecution is envisioned. While the Court infers that some validity possibly might exist where only the accounting is sought, that is not the case here. The circumstances herein clearly total a denial to petitioner of his privilege against self-incrimination.

It is difficult to comprehend how, in light of the foregoing, there is here presented no substantial federal question and therefore reconsideration is most respectfully requested.

In any event, since petitioner requested certiorari consideration, he should receive same. The question is certainly of substantial significance to warrant review as is indicated by the aforementioned cases. Here, petitioner was led to believe that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver and testify; and that should he sign a waiver he would have no immunity in answering incriminating questions and that he could not remain silent. All of the above which the petitioner was led explicitly to believe were inaccurate and erroneous and each has been held to be a violation of the constitutional privilege against self-incrimination. The result in the instant case was to place petitioner in a dilemma which this Court had previously stated it would not tolerate. *Garrity* v. *New Jersey, supra.*

Graphically, petitioner's quandry was as follows:

To ADMIT: Subject himself to criminal prosecution and imprisonment.

To DENY: Subject himself to prosecution for perjury.

To Refuse to Answer: Forfeit his livelihood and subject himself to prosecution for attempt.

Thus, to hold petitioner accountable for failure to do that which the State is prohibited from requiring him to do, and which constitutes clearly an abrogation of the privilege against self-incrimination cannot help but set a dangerous precedent in this case, possibly by inadvertence.

The circumstances herein cry out for an expression of opinion particularly, as aforesaid, in view of the fact that two justices favor summary reversal of the conviction.

In order that this case may receive the full consideration that justice requires, it is respectfully submitted that this petition for rehearing should be granted and that this case be given plenary consideration.

Respectfully submitted,

Goldman & Cooperman
Attorneys for Appellant
122 East 42nd Street
New York, New York 10017

Robert E. Goldman
Of Counsel

Certificate

I certify that this petition is presented in good faith and not for delay.

/s/ Robert E. Goldman

Robert E. Goldman
Counsel for Petitioner